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Supreme Court of the United States

OCTOBER TERM, 1960

No.

RICHARD SECOR CORLISS, FRED AUGUST HEISE, and WALTER HEROLD, Petitioners

v.

UNITED STATES OF AMERICA

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue in each case to review the judgments of the United States Court of Appeals for the Second Circuit, affirming the judgments of the United States District Court for the Southern District of New York, convicting the petitioners for violations of the Universal Military Training and Service Act.

OPINIONS BELOW

The joint opinion of the Court of Appeals has not yet been reported. It is printed, *infra*, pages 25-41, as Appendix A. The opinion of the District Court is reported at

173 F. Supp. 677 and appears in the record in the *Corliss* case. [C 84][1]

JURISDICTION

The judgment of the Court of Appeals was entered in each of these cases on July 22, 1960. See Appendices B, C and D, *infra*, pages 42-44. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P. Title 18, Section 3231, United States Code confers jurisdiction on the trial court. This petition is filed within 30 days from the date of the judgment of the Court of Appeals.

QUESTIONS PRESENTED

I.

Is the denial of the conscientious objector classification in each case by the appeal board without basis in fact, making the final 1-A appeal board classification arbitrary and capricious?

II.

Do the Universal Military Training and Service Act and the Regulations contemplate the denial of a conscientious objector classification because the objector stated he wanted the exemption from training and service for the purpose of pursuing the ministry, thus making illegal the recommendation of the Department of Justice in the *Corliss* case which denied Corliss due process of law before the appeal board?

III.

Since the statute defining what constitutes a conscien-

[1] Numbers appearing herein with brackets and preceded by "C" refer to pages of printed record in *Corliss* case; preceded by "HE" such numbers refer to pages of printed record in *Heise* case; preceded by "HR" such numbers refer to pages of printed record in *Herold* case.

tious objector does not hinge upon the registrant's having been born and raised in a conscientious objector religious faith, did the Department of Justice deny petitioner Heise procedural due process of law before the appeal board in recommending that petitioner be denied classification as a conscientious objector solely because of his late conversion as one of Jehovah's Witnesses?

IV.

Does the prejudice demonstrated by the local board upon the occasion of the personal appearance of petitioner Herold on June 29, 1954, deny him of procedural due process of law in the Selective Service System so as to make the final order to report for induction void?

V.

Was petitioner Herold denied procedural due process of law by the appeal board's receiving and considering, but not notifying petitioner of, a letter dated July 28, 1955, mailed to it which, although favorable in some respects, contained erroneous statement of facts that contradicted the truth as to the time of petitioner's conversion as one of Jehovah's Witnesses?

VI.

Was each petitioner illegally denied his right to have the use of the F.B.I. report upon the trial to test and determine in each case whether the résumé of the F.B.I. report sent to the appeal board was illegal because it omitted favorable evidence appearing in the F.B.I. report that each petitioner was a bona fide conscientious objector, notwithstanding the report of the hearing officer and the recommendation of the Department of Justice, and which favorable evidence answered such unfavorable recommendation in each case?

VII.

Was the petitioner Herold illegally denied his right to have the use of the F.B.I. report upon the trial in order to determine whether or not he had been denied procedural due process in the Department of Justice proceedings on his conscientious objector claim and in the recommendation to the appeal board by the use of unfavorable evidence appearing in the original F.B.I. report that did not appear in the résumé or summary mailed to the petitioner and to the appeal board, thereby denying him the right to fully defend his bona fides in the proceedings in the Department of Justice?

STATUTES AND REGULATIONS INVOLVED

Section 6(j) of the Universal Military Training and Service Act (50 U. S. C. App. § 456(j)) is involved here. See Appendix E, *infra*, pages 45-47. See also Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)), Appendix E, *infra*, page 45. Section 1622.1(b) and (d) of the Regulations (32 C. F. R. § 1602 *et seq.*), which is involved here, is printed in Appendix E, *infra*, at page 47. Sections 1622.11, 1622.14, 1626.25(b) and 1626.25(c) of the Selective Service Regulations, also involved here, are printed in Appendix E, *infra*, pages 48-50.

STATEMENT OF THE CASES

Petitioners seek review of three judgments of the United States Court of Appeals for the Second Circuit, affirming the convictions entered by the United States District Court for the Southern District of New York. The judgments were entered after trials without jury finding petitioners guilty of refusing to submit to induction into the Armed Forces in violation of the Universal Military Training and Service Act. [C 81-82; HE 46-47; HR 37-38]

Petitioners caused to be issued and served subpoenas

duces tecum commanding the production of the F.B.I. reports. [C 55-73][2] The Government moved to quash the subpoenas. The motions were opposed by petitioners. The trial court sustained the motions to quash in each case and declined to make the report available to petitioner in each case. The trial court also held that the rights of petitioners had not been prejudiced by sustaining the motions to quash in the opinion filed.

At the close of all the evidence in each of the three cases each petitioner made a motion for judgment of acquittal specifying each of the grounds presented upon the appeal. [C 14, 30; HE 11, 25; HR 10, 16] The motion for judgment of acquittal was overruled in each case for reasons stated extensively by the trial judge. (173 F. Supp. 677) [C 85-103] Petitioners appealed from the judgments of conviction on the grounds that the reasons stated by the trial court were contrary to law and fact and that they were denials of procedural due process of law on the trial because of quashing the subpoenas *duces tecum*. [C 83; HE 47-48; HR 39]

The Court of Appeals affirmed the judgments of conviction because of reasons stated extensively in a joint opinion (*infra*, pages 25-41).

Corliss Draft Board File

Corliss was born February 2, 1934. [C 105] He registered with his local board and filed a classification questionnaire showing that he was a conscientious objector. [C 105-106] On May 27, 1952, he was classified 1-A. On February 10, 1953, he requested information regarding his certification as a conscientious objector appearing in the questionnaire. The local board notified him in error that he had not signed the conscientious objector blank in the questionnaire. [C 108] The local board discovered its mistake and on November 30, 1953, mailed petitioner a conscientious objector form. [C 108]

[2] All of the motions and papers in all three of these cases appear in the record in the *Corliss* case.

He filled out the form and returned it to the local board. [C 111-121] Accompanying the form were supporting affidavits attesting to the sincerity of petitioner and his conscientious objections. [C 122-124] The form together with documentary proof attached thereto showed that Corliss was opposed to both combatant and noncombatant military service. [C 111-124] On January 5, 1954, Corliss was reclassified I-A by the local board. [C 109]

Thereafter Corliss requested a personal appearance, which was granted. [C 109] At the hearing he showed that as a member of Jehovah's Witnesses he could not "accept a I-A classification." [C 125]

The memorandum of the Government Appeal Agent, made after Corliss notified the local board that he was appealing to the appeal board, shows that petitioner "is a conscientious objector in that he is a member of the Jehovah Witnesses sect." [C 126] The file was forwarded to the appeal board on February 15, 1954. [C 109]

The appeal board referred the case to the Department of Justice for F.B.I. inquiry and an advisory recommendation from the Department of Justice on the conscientious objector claim of Corliss. [C 109] There was an F.B.I. inquiry which was summarized in one page. [C 135-136] It certified that "no derogatory information was developed" and also showed that registrant was "a sincere and active adherent of the Watchtower Bible and Tract Society," the legal governing body of Jehovah's Witnesses. He also showed that Corliss, although not baptized or ordained, "was considered by one church member to be an 'unordained' minister in that group." [C 136] Corliss appeared before the hearing officer of the Department of Justice, stated his conscientious objections to participation in combatant and noncombatant service and said that he wanted a conscientious objector classification—among other reasons—because it would enable him "to devote more time to preaching the gospel." [C 22] He showed that this, however, was not the only ground of his conscientious ob-

jection. [C 22] He said that he "couldn't participate in war in any form, whether in combatant or noncombatant service, because that would be going against God's commandments that he has laid down in the scriptures." [C 24]

Corliss showed that his father had helped him locate the scriptures that he relied upon by teaching him how to use the Bible concordance. [C 22] At the trial his father testified concerning teaching Corliss to use the Bible concordance to find the scriptures because he had first obtained the knowledge of the scriptures by "reading in the Watchtower, the various books and looking through the Bible, checking on whether or not those scriptures were there." [C 29] It took petitioner's father only two hours to teach him how to use the concordance. [C 29] This information was given to the hearing officer at the hearing. [C 22-25] Corliss also told the hearing officer that at the age of seven or eight years he first decided not to go into the army. [C 25] He added that he owed his allegiance "to God rather than to men." [C 25] At the hearing he also informed the hearing officer that his conscientious objections in addition to being stated in the conscientious objector form and attached papers were also stated in the *Watchtower* magazine. The hearing officer asked him if he believed what the *Watchtower* magazine stated. [C 25] Corliss tried to point out to the hearing officer the answers that he had made in the conscientious objector form that he thought the hearing officer "might not have read." [C 25]

The hearing officer reported to the Department of Justice that Corliss impressed him as "being sincere in his devotion to his religious sect and the principles for which it stands." [C 135] The hearing officer, however, added that Corliss "did not appear to have a genuine, personal conviction as to why he should not bear arms or participate in war." [C 135] The hearing officer recommended that Corliss' claim be not sustained. [C 135]

The Department of Justice wrote a letter to the appeal board containing a summary of the F.B.I. inquiry, which

was made a part of the recommendation of the Department of Justice. The letter also summarized facts appearing in the draft board file and the conscientious objector form. [C 133-134] In the same letter the Department of Justice summarized the report of the hearing officer concerning the hearing conducted upon petitioner's personal appearance. [C 134-135] The Department of Justice concluded the letter to the appeal board by finding "that the registrant's claim is not sustained." [C 135]

Corliss was mailed a copy of the adverse recommendation of the Department of Justice to the appeal board. He answered the statement in the adverse recommendation that "*registrant adheres* to the *tenets* of that faith, although he is not a baptized member." The answers of Corliss are extensive and should be read by the Court. [C 127, 128-129, 130]

The appeal board accepted the recommendation of the Department of Justice, rejected the answer of Corliss and classified him I-A on July 31, 1956. [C 110] On January 31, 1957, he was ordered to report for induction. On February 19, 1957, he reported for induction but refused to submit to induction. [C 5-6, 85, 110]

Heise Draft Board File

Heise was born on November 12, 1932. [HE 50] He registered with his local board on November 15, 1950. [HE 50] On receipt of classification questionnaire he filled it out and returned it to the local board for filing on October 24, 1951. [HE 52] He did not sign at that time Series XIV certifying that he was conscientiously opposed to his participation in war. [HE 54] He was classified October 25, 1951, as liable for unlimited military training and service in Class I-A. [HE 55] He was notified of this classification and ordered for a physical examination. Thereafter he was found to be physically defective and was placed in Class IV-F on February 18, 1952. He was so notified on February 18, 1952. [HE 55] Thereafter he was re-examined and was found to be physically acceptable, whereupon he was classi-

fied in I-A on February 19, 1953. He was so notified the following day. [HE 55]

Heise was thereafter classified in I-S(C), a school deferment, on April 1, 1953, and notified thereof the next day. [HE 55] On February 4, 1954, he was again classified in I-A and given notice of it the next day. [HE 55] He was notified to appear for a hearing on February 18, 1954. He appeared on that day and was thereupon reclassified I-A and mailed notice of classification on the same day. [HE 56]

On February 26, 1954, the local board mailed him a special form for conscientious objector, and he was requested to bring in the form on March 4. On February 27, 1954, Heise sent an extensive letter to the local board, stating that he wanted to appeal his classification, and requested a reopening because of new evidence "that would affect my status." [HE 62] He stated extensively his religious beliefs in opposition to military service. [HE 62-65]

He reported on March 4, 1954, "with Form 150 filled out." [HE 56, 65-71] He stated the nature of his beliefs in a Supreme Being causing him to be conscientiously opposed to both combatant and noncombatant military service. [HE 65-71] He stated that he, as one of Jehovah's Witnesses, stood in a position of "strict neutrality against participation and service in the armed forces." [HE 66]

The local board forwarded the file to the appeal board without giving consideration to the special form for conscientious objector. The file was returned to the local board so this might be done. [HE 56, 73] The local board thereupon ordered Heise to appear before it with respect to his conscientious objector claim. [HE 56, 73] Heise appeared on March 25, 1954. The memorandum of the local board shows that he became interested in the teachings of Jehovah's Witnesses in August, 1953, and that he "objects to bearing arms on behalf of the United States in the event of war or threat thereof and is not willing to do any work conducive to a war effort, even if he does not have to bear

arms. Registrant states that C. O. form No. 150 expresses his views." [HE 73-74] The memorandum corroborates what is stated in the special form for conscientious objector, that Heise started having Bible studies with Jehovah's Witnesses in August, 1953. [HE 69]

On April 13, 1954, Heise answered a special questionnaire sent to him by the local board [HE 75-78] showing that he believed in self-defense, could not participate in any war and his conscientious objections were based primarily on his desire to preach "and upon my unwillingness to use force in conflicts between the nations of this world." [HE 75-78]

On April 22, 1954, the local board classified Heise in I-A. He was notified thereof on April 23, and instructed to come in on May 6, 1954, "for Appeal." [HE 56] He appeared on that date before the Government Appeal Agent, who summarized his appeal, stating that Heise was "a conscientious objector." [HE 56, 79]

The file was thereupon sent to the appeal board, which board transmitted it to the Department of Justice for F.B.I. inquiry and advisory recommendation from the Department of Justice on the conscientious objector claim. [HE 51, 56-57]

Heise was investigated by the F.B.I. and a résumé of the report on such investigation appears in the file. [HE 84-85] He thereafter had a hearing before a hearing officer of the Department of Justice. [HE 79-80, 81-82] At such hearing Heise stated that he started to listen to the radio programs of Jehovah's Witnesses in August, 1952, and during August, 1953, he started to attend the meetings of Jehovah's Witnesses regularly and spasmodically between February and July of that year. He showed that he began preaching from door to door in November, 1953, and was baptized as an ordained minister in March, 1954. [HE 81]

The hearing officer reported to the Department of Justice that he was not favorably impressed as to the petitioner's sincerity in making his claim as a conscien-

tious objector because such claim was made "in February 1954 when his deferment as a student had expired" and also because Heise "had been reared as a Lutheran and apparently was a member of the Lutheran Church" until "May 1953." The hearing officer emphasized the fact that while Heise had been listening to the radio broadcasts of Jehovah's Witnesses with his brother since August, 1952, he did not become actively interested "until the latter part of 1953, just a few months before his student deferment was about to expire." [HE 83] The hearing officer concluded that Heise, by reason thereof, had not made his claim for classification as a conscientious objector in good faith and that he was making such claim "merely in an attempt to evade service." [HE 83]

An extensive recommendation in the form of a letter from the Department of Justice to the appeal board was made January 4, 1956. [HE 79-84] This recommendation contained a recital of some of the facts and a brief summary of the hearing conducted by the hearing officer. [HE 79-84] This was mailed to Heise, together with a copy of the résumé of the F.B.I. investigative report. [HE 84-85] Heise answered this adverse recommendation in an extensive letter. [HE 85-89] This was supported by affidavits of three persons familiar with his sincerity as a conscientious objector. [HE 89-90]

The appeal board classified him I-A, denying his claim for classification as a conscientious objector. [HE 51, 57] He was notified thereof on February 14, 1956. [HE 57] He was thereafter ordered on September 17, 1956, to report for induction on October 4, 1956. [HE 57] He reported but refused to submit to induction. [HE 57-58]

Herold Draft Board File

Herold was born on August 22, 1934. [HR 41] He registered with the local board and thereafter filed a classification questionnaire on October 2, 1952. [HR 41] At that time he was not a minister of religion but was working

for the Singer Sewing Manufacturing Company and had been so employed since August 27, 1952. [HR 43] He did not sign Series XIV in the questionnaire requesting special form for conscientious objector. [HR 44] The local board classified him in I-A on October 7, 1952, and so notified him. [HR 45]

On May 3, 1954, he was ordered to report for physical examination on May 24, 1954. [HR 45] He thereafter requested a special form for conscientious objector, which was mailed to him on June 3, 1954. [HR 45, 46] He completed and filed the form on June 8, 1954. [HR 46] He stated therein that he believed in a Supreme Being, his belief in a Supreme Being involves duties superior to those arising from any human relation, he believed God's Word to be the only true guide and his conscience must be guided by God's commandments. [HR 47]

He stated that he was taking a course of study in the Bible under direction of the Watchtower Bible and Tract Society, the governing body of Jehovah's Witnesses. [HR 48, 50] He stated that he relied on God's Word, the Bible, for his religious guidance and he believed in the use of force only as a means of self-defense or to protect his home. [HR 48] He stated that his parents, both living, were Lutheran, but he was one of Jehovah's Witnesses, having become a member of that organization in 1954 by "studying the Watchtower Society course"; that the location of the Port Richmond Congregation of Jehovah's Witnesses was at Staten Island, New York, Fred Schmidt being the presiding minister. [HR 50-51]

On June 29, 1954, a hearing was held on Herold's claim for classification as a minister of religion and as a conscientious objector. [HR 45, 52] The hearing was extensive. A report of the hearing was transcribed and a typewritten report appears in the selective service file. It is printed in its entirety. [HR 53-65]

At the hearing Herold showed that he was a minister and worked for a living as well. [HR 53] He devoted four

hours weekly preaching from door to door and spent a minimum of seven hours weekly attending various meetings of the congregation. He devoted forty hours weekly to his work for Singer Sewing Machine Company. [HR 54]

He was asked how many weddings he had conducted and whether he was "recognized by the State of New York as an officer to conduct marriage ceremonies." He said he had conducted none but did not know whether he was recognized by the State of New York. [HR 55] He had conducted no funerals or baptisms. [HR 55] He said he had been the principal speaker at two meetings in three months and was "taking training as a minister," not yet being ordained. [HR 55] He stated that his being called for a physical examination had nothing to do with his becoming one of Jehovah's Witnesses, since he was one "before that time." [HR 56]

The record shows that the examination of Herold by a member of the local board continued as follows: "Q Have you been sort of sitting back and figuring out how to beat this thing? A No. Q Suppose the Russians were coming up New York harbor, what would you do about it? A There's nothing I could do about it. Q Suppose I offered you a gun, a machine gun, what would you do, say if the Russians were heading for Albany? A I wouldn't do anything. People have very little fear of God. Q The Russians have no fear in God because they don't believe it's any— A — I think God would defend His people. . . . Q You consider yourself an American citizen? A Yes, I am an American citizen. Q Is that just an accident of birth? A I live in the land. Q Have you stopped saluting the Flag? A Yes. Q Did you salute the Flag when you went to Port Richmond High School? A I don't remember them having a Flag in the school. We never saluted the Flag in the school. Q That is not a good remark to go on the record, fellow. A Not in Port Richmond. Q Do you salute the Flag now? A No. Q Do you believe it is the Flag of our country? A It's the Flag of the United States.

Q Why don't you salute it? A I recognize Christ Jehovah [sic]. Q Do you remember what Christ said about Caesar? A Give unto Caesar what is Caesar's and to God what is God's. Q You know the Book but you don't bother with it? A (No answer). Q I think— A We owe our life to God, and only God, not to any other man. Q Who said anything about this life. I asked you about your allegiance when it comes to saluting the Flag. A (No answer). . . . Q Do you read some of the scurillous articles that appear in that Watchtower? A Everything I read I found to my liking. Q Isn't it a fact that some of those articles endorse hate? A I wouldn't say that. Q Have you ever heard what they say about Catholic priests and Catholic nuns? A Yes, I have. Q Aren't they articles of hate? A I don't hate them. Q You just despise them. A They don't accept any other religion except Jehovah's Witness. . . . Q Do you have a flock as a minister? A It is considered part of the flock. Q You are one of the mob, you are not one of the leaders. A That's right, and Paul and Peter were considered part of the flock. Q They were considered leaders, they were considered disciples and priests. The word priest came from the Jews, and the Jewish priests were the leaders. A They were considered ministers. Q That is from the Bible. A Christ is considered as a minister and so were His disciples. Q The trouble with the word minister is that you people have changed it and taken it out of its category. That is the only thing we object to." [HR 56, 57, 58, 59, 62-63]

Herold had a witness to accompany him to the personal appearance. At the end of the witness' testimony Board Member Dillon told the witness: "Tell Mr. Herold he has the right of appeal and he can exercise them." [HR 65]

On June 30, 1954, written notice of a 1-A classification was mailed to Herold. [HR 45] On July 7, 1954, Herold filed an appeal. Two days later his file was forwarded to the appeal board. [HR 45] On July 28, 1954, the appeal

board referred the file to the Department of Justice for advisory recommendation on his conscientious objector claim. [HR 45] On October 4, 1954, the résumé of the F.B.I. investigation conducted by the Department of Justice was prepared. [HR 70-71] This résumé and Herold's selective service file were forwarded to Hearing Officer Frank A. Barrera, in Brooklyn, New York, so that a hearing might be conducted by him. Such hearing was had on April 5, 1955. [HR 66, 67]

On July 8, 1955, following the hearing before the hearing officer, the Department of Justice wrote a letter of recommendation to the appeal board in New York City reporting on the hearing before the hearing officer. Such letter contained a summary of some of the facts appearing in the selective service file. The Department emphasized that Herold did not change his religion or request a conscientious objector form until after he got notice of the preinduction physical examination. It emphasized that he requested the conscientious objector form on June 1, 1954, and that on June 8, 1954, he filed it, stating he was one of Jehovah's Witnesses and for three months he had been taking a course of study given by the Watchtower Bible and Tract Society. [HR 66]

The recommendation letter refers to the local board hearing on June 29, 1954, and then recites a summary of the proceedings before the hearing officer on April 5, 1955, and mentions that he was accompanied by a "young lady friend." [HR 66-67]

The report of the Department of Justice hearing shows that Herold attended the convention of Jehovah's Witnesses held at the Yankee Stadium in the summer of 1953 and that thereafter, in April, 1954, he became acquainted with Fred Schmidt, the presiding minister of a congregation of Jehovah's Witnesses on Staten Island, New York, when and where he had a one hour Bible discussion which precipitated Herold's beginning weekly studies of the Bible at the church of Jehovah's Witnesses and attending three

times weekly and once a week "at the home of one of the members." [HR 67] He showed that he became active as a preacher in May, 1954, and was baptized on November 13, 1954. [HR 67]

The recommendation letter reports Herold as having based his conscientious objection to war upon the fact that he had "dedicated himself to do the will of the Jehovah God," and considered it "morally wrong to participate in war," based on "his study of the Bible." [HR 67] Herold read various passages of the Bible from a written memorandum he brought with him. On the subject of "theocratic warfare," according to the hearing officer, "registrant's answers were very vague, on further questioning as to various passages in the Bible his knowledge thereof seemed most limited and he relied to a great extent on the mere reading of his written notes which he had prepared for the hearing." [HR 67]

The recommendation letter also referred to the testimony of Herold's witness, Carol Gunn, who stated that "she became a member of the Jehovah's Witnesses through the registrant." The letter says: "It further developed at the hearing" that she had been "keeping company" with him for almost two years and "that they intend to get married but no date has been set for the wedding as yet." [HR 68] The hearing officer reported that "she seemed to have a much more comprehensive knowledge of the Bible" and of "the teachings and doctrines of the Jehovah's Witnesses" than did Herold, and that she "was anxious to amplify the answers of the registrant from an apparent realization that the registrant's answers had been unsatisfactory." [HR 68] The letter contains a one-paragraph summary of the résumé of the F.B.I. inquiry. [HR 68-69]

The letter recites that the "Hearing Officer found that he was not favorably impressed as to the registrant's sincerity in making his claim" because (1) it was too close to the day of his preinduction physical examination, (2) he had been reared as a Lutheran and remained as such until

May of 1954 after he began studying with Jehovah's Witnesses, (3) he had previously applied for enrollment in a military school and attempted to enlist in the Naval Reserve in 1952 and 1953, (4) he "showed a complete lack of knowledge and understanding of the Bible and the passages which he quoted from written notes which he brought with him to the hearing," (5) he "was not familiar with the teachings of the Jehovah's Witnesses and especially their doctrine of 'theocratic warfare'," and (6) his friend, Miss Gunn, appeared to the hearing officer to be "inducing the registrant to make this claim as a conscientious objector and was doing everything possible to substantiate his claim in the hope that the registrant could thus avoid military service, and she and the registrant could then get married as planned." [HR 69]

The recommendation letter to the appeal board concludes by stating: "The Hearing Officer concluded that the registrant's claim as a conscientious objector is not made in good faith, and that he is not sincere in his claimed conscientious objections based on religious training or beliefs. He further concluded that the registrant is making this claim merely in an attempt to evade service. He recommended that the appeal of the registrant, based upon grounds of conscientious objector, be not sustained. [¶] The Department of Justice finds that the registrant's claim is not sustained. It, therefore, recommends that the registrant's claim be not sustained by your Board." [HR 69-70]

On July 13, 1955, the appeal board mailed a copy of the recommendation letter to Herold so that he could, within thirty days, answer it if he chose. [HR 45]

Herold apparently showed this letter to Miss Gunn, who, in turn, showed it to Arthur Waugh, Assistant National Director of the Department of Americanism of the Regular Veterans Association. Mr. Waugh took it upon himself without the knowledge of Herold [HR 74] to write to the appeal board and comment on the recommendation of the Department of Justice. [HR 45, 72-75]

Waugh's letter of July 28, 1955, states that Miss Gunn "was for years a member of the writer's household." The letter contained statements that are inconsistent with some of those of Herold as to the length of time he had been one of Jehovah's Witnesses. The letter said that Herold "was in Witness work in about 1951 or 1952." It denied that Carol Gunn had ever been engaged to Herold and stated that she was only 17 years old and wanted "to see a bit of the world and life prior to marriage." [HR 73] It stated that "Walter was in Witness work long before 1954," that he "may have began serving as a 'preacher' in February 1954, but went to Witness meetings long prior to that." [HR 73] The letter on its face showed that Herold was not aware that it had been written to the appeal board, because the writer says: "Were he aware of this letter, he would refuse its mailing since the Witnesses might not want it sent." [HR 74] Waugh indicated that he is not one of Jehovah's Witnesses. He concluded: "let's stick to our American heritage and honor a man's right to worship God as he wishes. . . . let no man be suspect because he thinks a bit differently from us." [HR 75]

On August 12, 1955 Herold sent to the appeal board his answer to the recommendation of the Department of Justice. [HR 45, 76] Concerning his use of notes at the hearing he said: "I prepared a scriptural outline in order to give a Bible reason for the classification I applied for. He [the hearing officer] seems to have objected to this. I do not think this is a valid objection to my sincerity. What lawyer presents his case in court without first preparing an outline, or minister gives a sermon without a written outline?" [HR 76]

Concerning his application for enrollment in Kings Point Military College in 1953 and the U. S. Navy, he said he had been willing to serve in the armed forces "until I learned what Jehovah God really requires of Christians." [HR 76-77]

Concerning Miss Gunn's answer to the hearing officer's

question put to him, "What does the theocratic warfare mean to you?" he said that she "has a very clear knowledge of the principal teachings of the Bible and speaks of them very clearly." However, he said that he endeavored to explain the matter to the hearing officer, but "did not get any further in giving this answer." [HR 77]

He stated that his prior membership in the Lutheran church is no evidence of his lack of good faith. He said that his parents brought him up as a Lutheran as a boy, but he had now made his own choice as to his religion, and that the reason he became one of Jehovah's Witnesses was, not to evade the draft, but solely because "I had begun to understand the Bible clearly for the first time when I was assisted by Jehovah's Witnesses." [HR 78] He said that he began a serious study of "the Bible about March 1953 [and] it took some time for me to arrive at the proper conclusion of Bible doctrines. Therefore, it is not strange that it took from March to June 1, 1954, to realize that I must dedicate myself to serving the Most High God Jehovah." [HR 78] He then indicated that since it was necessary for him "to make changes" in his "life's activities in order to conform to God's requirements" he could not go forward with his original plan to enroll in the military school or do "any other form of military service." [HR 78]

He answered the hearing officer's statement about Miss Gunn and himself. He said he told the hearing officer they were keeping company, but were not engaged to be married and had no definite plans to marry. Herold accused the hearing officer of reaching a bald conclusion in this. He said: "Mr. Barrera has injected something that doesn't even exist and therefore presents an argument which is not true." He asked the appeal board to weigh the facts which "tell an entirely different story than Mr. Barrera does." [HR 79]

The appeal board, upon receipt of Herold's reply to the unfavorable evidence, proceeded to consider his letter and the Department of Justice recommendation, as well

as "all other documents contained in the Cover Sheet," including the report of the prejudicial local board hearing on June 29, 1954, appearing in the record. [HR 80, 53-65]

There was filed "by direction of the appeal board" a unanimous opinion of the appeal board, the members of which stated therein that they found themselves "in full agreement with the recommendation of the Department of Justice" and "accept the recommendation and hereby affirm 1-A." [HR 80] The appeal board thereupon unanimously classified Herold 1-A and returned the file to the local board, which mailed to Herold the notice of classification on August 29, 1955. [HR 46]

Herold, on September 6, 1955, wrote two letters to the State Director of Selective Service asking him to request the local board to reconsider the classification or to appeal his classification to the President. [HR 81-83]

On June 4, 1957, the local board mailed to Herold an order to report for induction on June 24, 1957. Herold reported but "refused to take one step forward." [HR 46, 17]

REASONS FOR GRANTING THE WRITS

I.

In all three of these cases there was a denial of the conscientious objector status without basis in fact. The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeals. In those cases the appellants, like petitioner here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in these cases, whether there was basis in fact. See *Jessen* v. *United States*, 212 F. 2d 897 (10th Cir. 1954), where the court (after following *Taffs* v. *United States*, 208 F. 2d 329) said: "The remaining question is whether there was any basis in fact

for the classification made by the State Appeal Board."

The holdings of other circuits that there was no basis in fact for the denial of the classifications in these cases, with which the holding of the court below directly conflicts are: *Batterton* v. *United States*, 260 F. 2d 233 (8th Cir. 1958); *Parr* v. *United States*, 272 F. 2d 446 (9th Cir. 1959); see also *Annett* v. *United States*, 205 F. 2d 689 (10th Cir. 1953); *United States* v. *Pekarski*, 207 F. 2d 930 (2d Cir. 1953); *Taffs* v. *United States*, 208 F. 2d 329 (8th Cir. 1953); *Jewell* v. *United States*, 208 F. 2d 770 (6th Cir. 1953); *Schuman* v. *United States*, 208 F. 2d 801 (9th Cir. 1953); *United States* v. *Hartman*, 209 F. 2d 366; *Pine* v. *United States*, 212 F. 2d 93 (4th Cir. 1954); *Weaver* v. *United States*, 210 F. 2d 815 (8th Cir. 1954); *Jessen* v. *United States*, 212 F. 2d 897 (10th Cir. 1954); *United States* v. *Close*, 215 F. 2d 439 (7th Cir. 1954); *United States* v. *Wilson*, 215 F. 2d 443 (7th Cir. 1954). *Witmer* v. *United States*, 348 U. S. 375 (1955), is not in point and is not *contra* to petitioners.

None of the above cases ought to be pushed aside on the specious but factitious ground that because the courts in some of those cases discussed the speculations urged on the courts as basis in fact the cases are different. They are not different because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in these cases and the holdings were opposite to those made by the court below in these cases. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in these cases in so far as the statements in the draft board record showing conscientious objection are concerned.

It is submitted, therefore, that there is a direct conflict between the holding of the court below and the holding of other courts of appeals on this question. Petitioners also contend that this is a substantial question that has not been determined but which should be determined by this Court.

This gives a basis for granting the writs of certiorari in these cases.

II.

The holding of the court below in these cases that there was basis in fact for the denial of the conscientious objector status because petitioners were recent converts to Jehovah's Witnesses and also the recommendation of the Department of Justice in the *Heise* case, based on the same ground, constitutes a denial of due process of law. The nearness of the conversion of the petitioners to the beliefs of Jehovah's Witnesses which produced their conscientious objection (and this was the only basis relied upon) is alone not basis in fact for the denial of the conscientious objector status. The reliance upon this specious fact (in each case by the courts below and also by the Department of Justice in the *Heise* case in its recommendation to the appeal board) constitutes a violation of the Act, the Regulations and due process of law.

This is a substantial question of law that has not been determined but which should be determined by this Court.

This question was presented to this Court in the petition for writ of certiorari in *Simmons* v. *United States*, 348 U. S. 397 (No. 251, October Term, 1954), and was found by the Court to be a sufficiently substantial reason to grant the writ. Since the question was substantial in that case it should still now be substantial in these cases, the opinion of Judge Lindley in *United States* v. *Simmons*, 213 F. 2d 901 (7th Cir. 1954), to the contrary notwithstanding. See the petition for writ of certiorari in the *Simmons* case (No. 251, October Term, 1954) at pages 19-20.

It is submitted, therefore, that this is now a sufficiently substantial question to warrant this Court in granting the writs of certiorari in these cases.

III.

The holding of the court below that because Corliss asked for the conscientious objector classification so that

he could devote more time "to Jehovah's work of preaching the gospel" constituted basis in fact (*Tomlinson* v. *United States*, 216 F. 2d 12, 18 (9th Cir. 1954), cert. denied 348 U. S. 970 (1955)) is not only out of harmony, but is also in direct conflict, with *Sicurella* v. *United States*, 348 U. S. 385, 391 (1955), where the Court said: "Once he comes within § 6(j), he does not forfeit its coverage because of his other beliefs which may extend beyond the exemption granted by Congress."

In the event that the Court does not find that there is sufficient conflict to justify the granting of the writ then it is suggested that the question presented is substantial. Compare *United States* v. *Erikson*, 149 F. Supp. 576, 578-580 (S.D. N.Y. 1957), which opinion by Judge Irving Kaufman held that a recommendation of the Department of Justice similar to that in the *Corliss* case was a denial of procedural due process of law.

IV.

The holding of the court below that the above-quoted prejudicial remarks made by members of the local board at the personal appearance of Herold did not constitute a denial of procedural due process of law is in direct conflict with the holdings of other courts in *United States* v. *Stepler*, 258 F. 2d 310, 316 (3rd Cir. 1958); *Niznik* v. *United States*, 184 F. 2d 972 (6th Cir. 1950); and *Mintz* v. *Howlett*, 207 F. 2d 758 (2d Cir. 1953); compare *United States* v. *Balogh*, 157 F. 2d 939 (2d Cir. 1946); judgment vacated on other grounds, 329 U. S. 692 (1947); judgment of conviction affirmed, 160 F. 2d 999 (2d Cir. 1947); cert. denied, 331 U. S. 837 (1947). If there is no conflict found by this Court then a substantial question is involved that ought to be determined by this Court. The holding is also in conflict with *Steele* v. *United States*, 240 F. 2d 142, 146 (1st Cir. 1956), because the Government failed to discharge the burden placed upon it to show that the appeal board did not consider the poisonous memorandum of opinions of prejudice against Jehovah's Witnesses made by the local board to the appeal board.

V.

The petitioners were illegally denied their right to have the use of the F.B.I. reports upon the trial to test and determine whether the résumés of the F.B.I. reports sent to the appeal board were illegal because they omitted favorable evidence appearing in the F.B.I. reports that petitioners were bona fide conscientious objectors, notwithstanding the reports of the hearing officers and the recommendations of the Department of Justice, and which favorable evidence answered such unfavorable recommendations.

The argument in support of the substantiality of this question has been fully exhausted in the brief for petitioner in *Gonzales* v. *United States*, No. 416, October Term, 1959, pages 40-62. The argument there made is here referred to and made a part hereof by reference as though copied at length herein. See also the petition for rehearing filed in that case, now pending in this Court.

It is submitted that the Court ought to reconsider its ruling in *Gonzales* v. *United States*, No. 416, October Term, 1959, and hold that the decision in that case was then and now still is erroneous and contrary to the Statute, the Regulations and the Constitution.

CONCLUSION

Wherefore, for the reasons above stated, the petition for writ of certiorari in each of these cases should be granted.

Respectfully,

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August, 1960.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 151, 152 and 153—October Term, 1959.
(Argued December 1, 1959 · Decided July 22, 1960.)
Docket Nos. 25706, 25707 and 25708 ·

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD SECOR CORLISS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRED AUGUST HEISE,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WALTER HEBOLD,
Defendant-Appellant.

Before:

CLARK, WATERMAN and FRIENDLY,
Circuit Judges.

Appeals from judgments of the District Court for the Southern District of New York, Thomas F. Murphy, *Judge*, 173 F. Supp. 677, convicting appellants of refusing to submit to induction into the armed forces of the United States. Affirmed.

ROBERT E. SCHER, Ass't U. S. Att'y (S. Hazard Gillespie, Jr., U. S. Att'y, and George I. Gordon, Ass't U. S. Att'y on the brief), *for Plaintiff-Appellee*.

HAYDEN C. COVINGTON, Brooklyn, N. Y. (Herman Adlerstein, New York, N. Y. on the brief), *for Defendant-Appellants*.

FRIENDLY, *Circuit Judge*:

These are appeals from judgments of the District Court for the Southern District of New York convicting appellants, who claim to be conscientious objectors, of refusing to submit to induction into the armed forces of the United States, 50 U. S. C. App. § 462. Each appellant was sentenced for a year and a day. The facts are stated in Judge Murphy's reasoned opinion, 173 F. Supp. 677 (1959); we shall refer only to such as are required for disposition of the appeals.

All three cases followed the same general course—classification or reclassification of the registrant as 1-A by the Local Board after personal appearance by the registrant; request for appeal; investigation by the Federal Bureau of Investigation; hearing before a hearing officer of the Department of Justice, with a résumé of the F.B.I. report having previously been furnished; adverse report by the hearing officer to the Department; adverse recommendation by the Department to the Appeal Board; 1-A classification by the Appeal Board; refusal of the registrant to be in

ducted; indictment, trial to the judge, and conviction. A point common to all three appeals was an order of the District Court, Alexander Bicks, *J.*, quashing subpoenas whereby appellants sought production of the investigative reports of the F.B.I. Since the issue whether persons in appellants' position were entitled to discovery of such reports was pending before the Supreme Court in *Gonzales* v. *United States*, —— U. S. ——, decided June 27, 1960, we deferred decision pending resolution of that issue there.[1] Appellants do not claim the résumés were inaccurate, and the Department's recommendations were based on materials in appellants' Selective Service files, the hearing before the hearing officer, and, in a minor degree, uncontroverted facts in the résumés. The cases thus fall within the rule of non-production of the F.B.I. investigative reports laid down in *Gonzales* and not within the exception, there stated, of "circumstances in a particular case where fairness in the proceeding might require production."

The principal questions remaining, indeed the only ones in Corliss' and Heise's appeals, are whether there is any basis in fact to sustain the Appeal Board's denials of appellants' claims that "by reason of religious training and belief" they are "conscientiously opposed to participation in war in any form," 50 U. S. C. App. § 456(j). Such an inquiry is not easy. For though "the state of a man's mind is as much a fact as the state of his digestion," *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459, 483 (1885), it is a lot less susceptible of objective determination. In discharging this unenviable task, courts must be mindful that "The range of review is the narrowest known to the law," *Blalock* v. *United States*, 247 F. 2d 615, 619 (4th Cir. 1957); that, apart from denial of procedural fairness, they may reverse the Appeal Board "only if there is no basis in fact for the classification which it gave the registrant," *Estep* v. *United States*, 327

[1] The Court denies the request made by appellants under date of July 11, 1960, for a further postponement pending disposition of a petition for rehearing by the Supreme Court in the *Gonzales* case.

U. S. 114, 122-23 (1946); and that "any fact which casts doubt on the veracity of the registrant is relevant." *Witmer v. United States*, 348 U. S. 375, 381-82 (1955).

Heise

Under these rigorous tests Heise's conviction must be affirmed. Heise was born November 12, 1932. He had been brought up as a Lutheran. In his initial registration questionnaire, filed October 24, 1951, he did not claim to be a conscientious objector. He was classified 1-A, thereafter found physically unqualified and classified IV-F until February 18, 1952, then reclassified 1-A on February 19, 1953. He applied for a student deferment, which he received on April 1, 1953, valid until February 1, 1954; on February 4 he was reclassified 1-A. On February 8, 1954 he requested "a deferment for at least another year in order to finish my studies" at New York Community College, and asked for a hearing. This was held on February 18, 1954; the Board voted 4-0 to classify Heise as 1-A. Its summary, after referring to the request for a student deferment, adds "States that he has been taking bible course studies with Jehovah's Witness group since last August."; Heise's summary puts the two grounds in the opposite order. In any event, he asked for and received a conscientious objector form (SSS Form 150).

Heise returned the form on February 27. His letter of transmittal requested a reopening of his classification "because of new evidence that would affect my status. This new evidence could not be submitted earlier because my beliefs and convictions were different. Through Bible studies and associations with Jehovah's witnesses I now have conscientious and sincere objections to participating in combatant and non-combatant military service." There followed a several page description of the Witnesses, replete with Scriptural and historical references, but rather silent as to Heise's personal beliefs save for a statement of his having been impressed by attendance at the Witnesses'

assembly at the Yankee Stadium in July, 1953. The letter ended by enclosing a copy of the Watchtower magazine of February, 1951, and promising "More evidence will be supplied to you in the near future." In answering the question on Form 150 where he had received the training and acquired the belief relied on for exemption, he stated he had been "Listening to radio station WBBR for over a year and associating with Jehovah's Witnesses," and "In August, 1952, I started to attend Bible studies and other meetings at Kingdom Hall, 526 86th St., beginning August, 1953." He stated, in answer to another question, that he had "also been preaching from door to door" but that he hadn't publicly expressed his views concerning non-participation in war. A letter from three Jehovah's Witnesses ministers attested that Heise had been regularly attending study and congregational meetings since August, 1953, and "has been actively expressing his status as one of Jehovah's Witnesses from the month of November, 1953." A hearing before the Local Board on March 25, 1954, revealed that Heise had been baptized as a Witness on March 13; again the Board voted 4-0 for 1-A.

The only new fact of significance added by the F.B.I. investigation was that Heise had told instructors at the Community College in November, 1953, that he was leaving school to commence studies for the ministry but changed his mind one day later in favor of completing his course. Before the hearing officer, although Heise asserted the religious basis of his conscientious objection to be the Bible, he "was unable to point out any passage of the Bible to sustain his beliefs and constantly referred to several pages of typewritten notes which he brought with him and which apparently were a copy of a letter sent to the Local Board under date of February 27, 1954." The hearing officer "was not favorably impressed as to the registrant's sincerity in making his claim."

It would seem that if Heise had, in fact, become a convinced conscientious objector in November, 1953, 32 C. F. R.

§1625.1 (b), which we quote in the margin[2] required him promptly to advise the Local Board, see *Williams* v. *United States*, 203 F. 2d 85, 87-88 (9th Cir.), *cert. denied*, 345 U. S. 1003 (1953); *United States* v. *Vincelli*, 215 F. 2d 210, 213 (2d Cir. 1954). Not only did he fail to do this, but his initial reaction to the 1-A classification on February 4, 1954, was to request an extension of his student deferment on February 8 and again on February 18, and on February 27 he wrote the Local Board that the evidence as to his beliefs "could not be submitted earlier." The Board was thus warranted in concluding that Heise's conscientious objections had not ripened as late as February 8, even though Heise may have become interested in the Witnesses in a general way some time before. Something may, indeed, have happened to Heise between February 8 and February 18 or 27, but the Board was not bound to find it to be what Heise claimed. Sudden accessions of belief may be utterly sincere, as the memorable one on the Damascus road; but they seldom synchronize so perfectly as Heise's with external facts making them convenient, and they normally manifest themselves in expressions more deeply personal than his. The Appeal Board might likewise have regarded the concatenation of Heise's baptism and the second hearing as not wholly adventitious. There were thus sufficient "objective facts before the Appeal Board to * * * cast doubt on the sincerity of his claim." *Witner* v. *United States*, *supra*, at 382; see *United States* v. *Simmons*, 213 F. 2d 901, 905-06 (7th Cir. 1954), reversed on other grounds, 348 U. S. 397 (1955); *Cambell* v. *United States*, 221 F. 2d 454 (4th Cir. 1955).

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[2] "(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof."

CORLISS

Corliss' appeal presents a quite different case. Here there was no such belated conversion as in the cases of Peterson or, as we shall see, of Herold. When Corliss filed his classification questionnaire on April 2, 1952, shortly after becoming 18, he claimed to be a conscientious objector and requested Selective Service Form 150. The Local Board immediately classified him 1-A. On November 30, 1953, the Board mailed him the Form 150 which he duly returned. A statement annexed to the Form recited that in November, 1945, a Jehovah's Witness came to the Corliss home and told Corliss' parents about the Witnesses' faith; that Corliss' father immediately started home Bible study, conducted by a minister of the Witnesses, at which the entire family studied; that within weeks they began to attend public sermons and Watchtower study on Sunday afternoons and by the summer of 1946 were attending theocratic ministry school and service meetings on Friday nights; that in June, 1952, his father was baptized and became a Jehovah's Witnesses' minister; and that Corliss was pursuing studies intended to enable him to do so. The Form was supported by letters from two Jehovah's Witnesses ministers and from two friends. A hearing was held on February 2, 1954, at which Corliss appeared; the Board voted 4-0 to adhere to the 1-A classification. The F.B.I. investigative report confirmed that "references believe that registrant is a sincere and active adherent of the Watchtower Bible and Tract Society"; no adverse information was developed save for the admitted fact that Corliss had not himself been baptized in the Witnesses' faith.

The hearing officer's report states that Corliss, although admitting that he was not yet an ordained minister of the Witnesses, "asked for his conscientious objector classification because he should devote more time to Jehovah's work of preaching the Gospel." If this had stood alone, Corliss' claim would not have been made out, *Tomlinson* v. *United*

States, 216 F. 2d 12, 18 (9th Cir. 1954), *cert. denied*, 348 U. S. 970 (1955). However, the report further recites testimony by Corliss "that long before, when he was seven or eight years old, he had decided he would not go into the army and he realized that the time had come to do something about it"; that he had first thought he would go into some noncombatant branch but now "would not feel right about giving his allegiance even in that capacity as he owes his allegiance to God rather than to a nation." An unidentified accompanying witness stated that when Corliss "was confronted with the decision to serve, he was faced with the decision whether to bear arms and realized that it was wrong to kill"; "that he [the witness] felt that registrant is sincere but is confused; that the registrant does not want to kill or take part in worldly conflicts but would try to protect himself; that if he killed with intent to do so it would be held against him." The hearing officer found that while Corliss impressed him as "being sincere in his devotion to his religious sect and the principles for which it stands, he did not appear to have a genuine, personal conviction as to why he should not bear arms or participate in war."

In a letter dated July 16, 1956 to the Appeal Board following receipt of the adverse recommendation of the Department of Justice, Corliss developed, in much greater detail than theretofore, his belief that for him to desert God's spiritual army "and join this world in its fights would be disloyalty to God and Christ. It would deserve to be punished with destruction without any hope of life in the righteous new world." Dealing with the hearing officer's statement that he was not yet a baptized member or ordained minister, he explained that baptism was "an outward symbol or testimony before witnesses of the baptized one's complete, unconditional dedication and agreement to do the will of Jehovah God"; and that "Up to this time I have not yet felt prepared to take this im-

portant step but I am fully convinced in my own mind that I must openly show my dedication * * * " The Appeal Board unanimously classified him 1-A.

Many of the arguments on which the government seeks to support the determination of the Appeal Board are unimpressive. The government stresses a statement in the appeal agent's summary of the hearing before the Local Board that Corliss "is presently studying the scriptures in order to become a full-fledged member of the Jehovah Witnesses" as indicating that he was not then in fact a Witness; but when the summary is read in context, it must be deemed to refer to the statements in the questionnaire and accompanying answers that Corliss had not yet completed his studies for the ministry. Along the same lines, the government emphasizes Corliss' statement in his letter to the Appeal Board that he had not yet felt prepared to take the important step of baptism; again the context makes it plain that Corliss regarded this as equivalent to initiation into the ministry and the statement strikes us as a display of candor rather than the reverse. The government seizes upon the statement of the unidentified witness who accompanied Corliss before the hearing officer that Corliss was "confused"; this again could well have referred to Corliss' unwillingness to be baptized and, like the statement dealt with in *Parr* v. *United States*, 272 F. 2d 416, 420 (9th Cir. 1959), "is worthless for any bearing it may have upon appellant's sincerity in objecting to military service," without more knowledge of the witness' standard of clarity than the record gives. The government urges allegedly unsatisfactory responses by Corliss as to reasons for his unwillingness to render noncombatant service; even if the criticisms were justified, which we doubt, they would not support a 1-A classification. Argument is also made on the basis of Corliss' statement to the hearing officer that he had first formulated an intention not to go into the army when he was 7 or 8 years old,

whereas he did not become interested in the Witnesses until he was 12; surely eight years of membership thereafter were enough for a fusion of any childish views with views based on "religious training and belief."

Nevertheless we feel constrained to sustain the conviction. *Witmer* v. *United States*, *supra*, at 381, teaches that where the claim for exemption arises under the conscientious objector provision of §6(j) of the Universal Military Training and Service Act, 50 U. S. C. App. §456, as distinguished from the ministerial exemption of §6(g), "the registrant cannot make out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question." It would seem to follow that although denial of exemption may be and often is supported by objective facts inconsistent with the claim, denial may also rest on a disbelief in the sincerity of the claim, unaccompanied by any inconsistent facts, provided the disbelief is honest and rational.

We see no reason to suppose that the Supreme Court's reversal, 348 U. S. 397 (1955), of *United States* v. *Simmons*, *supra*, on a procedural ground, reflected adversely on the statement of the Court of Appeals that the best evidence on a registrant's sincerity "may well be, not the man's statements or those of other witnesses, but his credibility and demeanor in a personal appearance before the fact-finding agency.", 213 F. 2d at 904, see, *accord*, *White* v. *United States*, 215 F. 2d 782, 786 (9th Cir. 1954), *cert. denied*, 348 U. S. 970 (1955)—a rule long recognized in cases of other sorts. *United States* v. *Burton*, 25 Fed. Cas. 767, 770 (No. 14919) (C. C. D. Mich. 1853); see *Broadcast Music, Inc.* v. *Havana Madrid Restaurant Corp.*, 175 F. 2d

77, 80 (2d Cir. 1949).[1] Neither do we see any logical basis for limiting this rule of according weight to the observations of the registrant by the Local Board and the hearing officer to cases where there are issues of veracity as to some subsidiary fact, as against a case, like Corliss', where the only real issue is the ultimate one of the sincerity of his conscientious opposition to participation in war in any form by reason of religious training and belief. To do so would make mere parroting suffice, at least if it antedated the draft call long enough and if it was not accompanied by inconsistent conduct or demonstrable prevarication as to subsidiary facts. On the other hand, to sustain the denial of a claim on a mere *ipse dixit* of lack of sincerity from the Local Board or the hearing officer would create serious possibilities of abuse. Here the judicial task, difficult in any case, becomes harder still. The Court in effect must determine, as best it can, whether the Local Board or the hearing officer and, ultimately, the Appeal Board were rational and sincere in disbelieving the sincerity of registrant's belief in the absence of conduct inconsistent with the registrant's assertion, and this on a record always cold and often thin.[2] The dilemma is a cruel one; we resolve it for this case by finding enough in the printed record to support the determination of lack of sincerity of conscientious objection even though Corliss' association with the Witnesses long antedated his liability for military service and there was no evidence of conduct inconsistent with his claim of sympathy with that sect.

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[1] We do not regard *Parr v. United States*, *supra*, as to the contrary. Apart from the fact that Judge Pope wrote the opinions in both *White* and *Parr*, Parr had never appeared in person before the Local Board, and the Court found it "plain that the author of the Department of Justice letter of advice to the appeal board based his conclusions solely upon what he found in the Selective Service record of the registrant." 272 F. 2d at 422, rather than, as here, upon the impression of the registrant formed by the hearing officer after a personal appearance.

[2] The problem of the Appeal Board itself is not altogether different, although the Board may be aided by a more ample record, previous experience with the Local Board and the hearing officer, and its general expertise in this area.

The statute requires the registrant to demonstrate two elements—personal conscientious opposition to participation in war in any form, and the source of such opposition in "religious training and belief" as there defined. Neither suffices without the other. As said in *United States* v. *Simmons*, *supra*, at 904-05:

> "Affiliation with a particular religious sect does not *per se* entitle a registrant to conscientious objector status. The duty imposed on the boards is to determine subjectively and objectively the sincerity of the individual's belief, not the nature of the teachings of any religious faith. Each case must stand or fall on its own facts."

While the statement attached to Corliss' Form 150 described much of the theology of Jehovah's Witnesses and of Corliss' association with the Witnesses, the answers seem more learned than personal. Of course, no adverse inference can be drawn from some display of knowledge of the Scriptures, a characteristic of heretical Christian sects at least since the thirteenth century,[1] but what was important here was not what the Bible says but what Richard Secor Corliss had derived from his study of it. A possible explanation of this impersonal quality of Corliss' answers was developed at the Department of Justice hearing where he admitted he had been assisted by his father in preparing the SSS Form 150 "due to his unfamiliarity with the location of Scripture necessary to support his statements." Although there is nothing wrong in a registrant's obtaining assistance, the hearing officer might have drawn the inference that not only were the references the father's but perhaps the thoughts as well. On the other side, one of the reference letters by a friend recited Corliss' expressions of personal religious views that he "would never engage in combat or give his allegiance to any political group," and the other does so less explicitly; also,

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[1] See G. G. Coulton, Inquisition and Liberty, p. 184.

for aught we know, a good deal may have been said on the subject in the February 1, 1951 issue of Watchtower which Corliss annexed to the questionnaire. However, the letters of the two ministers are silent on this subject and the Board could reasonably have thought that neither the letters of friends nor the attachment of a periodical performed the office of a personal avowal. Not until we come to Corliss' letter of July 16, 1956 to the Appeal Board do we find a full statement of the basis for his conscientious objection to military service. The Appeal Board would have been free to overturn the action of the Local Board and the recommendation of the Department of Justice on this ground or others, *United States* v. *Pitt*, 144 F. 2d 169, 172 (3rd Cir. 1944), but it could just as rationally have deemed this belated expression to reflect adversely on Corliss' sincerity as to support it. We think, therefore, there is enough, although barely enough, to sustain a determination that, in the language of the hearing officer, although Corliss was "sincere in his devotion to his religious sect and the principles for which it stands, he did not appear to have a genuine personal conviction as to why he should not bear arms or participate in war."

HEROLD

Review of Herold's case shows sufficient objective facts to sustain the rejection of his claim. Born August 22, 1934, he was reared as a Lutheran. In filing his classification questionnaire in October, 1952, he made no assertion that he was a conscientious objector; he was classified I-A. Before that, in March, 1952, he had attempted to enlist in the Naval Reserve, but was rejected for physical reasons. In August, 1953, he applied for enrollment in Kings Point Military College; this would have required two years of military service after graduation, as Herold was aware. His preinduction notice was mailed May 3, 1954. On June 1, 1954, he requested and on June 8 filed the conscientious objector SSS Form 150.

In this he alleged he had been "taking the course of study given by the Watchtower Bible and Tract Society for the past three months, using the Bible aids published by the Society; that he did "not rely on any individual for my religious guidance but receive accurate knowledge from God's word by topical study of the Bible"; but that he had never given public expression to the views relied on as showing the basis for his claim. At the hearing before the Local Board he claimed to be a minister and put his claim solely on that ground; however, examination brought out that he merely expected to be ordained. Amato, a Jehovah's Witnesses minister, who was one of Herold's references, asserted Herold "is entitled to deferment as any secular would be going through the seminary"; in this he was mistaken, since the statute, 50 U. S. C. App. §456(g), grants the student exemption only to those "pursuing full time courses of instruction in recognized theological or divinity schools" or "full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled."

The hearing officer was adversely impressed by the synchronization of Herold's interest in the Witnesses and the notice of induction. He also found that "in testifying as to his study of the Bible being the basis for his claimed belief as a conscientious objector, the registrant showed a complete lack of knowledge and understanding of the Bible and the passages which he quoted from the written notes which he brought with him to the hearing." The officer noted that a young lady who accompanied Herold to this hearing, as she had before the Local Board, "attempted to prompt the registrant in his answers with reference to the questions concerning the Bible"; although the officer may have had no basis for his assumption as to marital intentions of the pair and the young lady's desire to assist on that account, this does not necessarily eliminate the inference that the sentiments that Herold was voicing may have been predominantly hers rather than his. Herold-

answer to the Department's adverse recommendation. "What lawyer presents his case in court without first preparing an outline, or minister gives a sermon without a written outline?", may also have had an effect on the Appeal Board opposite to that intended; sincere persons do not normally prepare "outlines" of deeply held personal beliefs, and there was also the question whether the "outline" had been prepared by Herold or someone else.

Herold asserts two claims of procedural unfairness. The first is that the Local Board displayed a degree of prejudice that infected the entire proceeding. While the questioning did become somewhat heated, many of the passages, when read in context, do not seem to have the sinister significance that appellant gives them. In any event, we are here reviewing the action of the Appeal Board, which had the record of the Local Board before it, and was as able to detect prejudice on the part of the Local Board as we are. It is settled that where there is no evidence that the Appeal Board has been misled, unfair conduct by members of the Local Board will not upset a classification. *Cramer* v. *France*, 148 F. 2d 801, 804-05 (9th Cir. 1945); *Davis* v. *United States*, 203 F. 2d 853 (8th Cir.), *cert. denied* 345 U. S. 996 (1953); *Reed* v. *United States*, 205 F. 2d 216 (9th Cir. 1953), *cert. denied* 346 U. S. 908 (1953); *Falbo* v. *United States*, concurring opinion of Mr. Justice Rutledge, 320 U. S. 549, 555 (1944). Cases where the Local Board had applied an erroneous test and it is impossible to tell whether the Appeal Board relied upon this, e.g., *United States* v. *Stepler*, 258 F. 2d 310, 316 (3d Cir. 1958), *Nizuik* v. *United States*, 184 F. 2d 972 (6th Cir. 1950), and *Mintz* v. *Howlett*, 207 F. 2d 758 (2d Cir. 1953), are distinguishable. See *United States* v. *Chadorski*, 240 F. 2d 590, 592-93 (7th Cir. 1956), *cert. denied* 353 U. S. 950 (1957).

Herold's other procedural point relates to the inclusion in his file of a letter to the Appeal Board, the existence of which allegedly was not disclosed to Herold. The letter, commenting on the recommendation of the Department of

Justice, came from Arthur Waugh, Assistant National Director, Department of Americanism, Regular Veterans Association—a Catholic and former Navy man. The general tenor of the letter was highly favorable, stressing Herold's sincerity, endeavoring to explain away his application for Kings Point Military College, and challenging the hearing officer's conclusion as to the serious intentions of the young lady, previously a member of Waugh's household who, Waugh stated, "is now 17, wants to see a bit of the world and life prior to marriage and is actively engaged in 'looking over the field.'" The one thing in Waugh's letter now claimed to have been prejudicial is that, in the course of asserting Herold's sincerity, Waugh said that Herold "was in Witness work in about 1951 or 1952 but was not then a 'preacher' nor one of their speakers"—he "may have began serving as a 'preacher' in February 1954, but went to Witness meetings long prior to that." This, it is asserted, might have had a boomerang effect in view of Herold's attempt to enlist in the Naval Reserve in March, 1952, his failure to claim conscientious objection in October, 1952, his application for Kings Point in October, 1953, and his own statement that his taking "the course of study given by the Watchtower Bible and Tract Society" had begun only in April, 1954. The government contends the Appeal Board must be presumed not to have considered the letter in view of the Regulation, 32 C. F. R. §1626.24(b), which forbids this; appellant counters with the Appeal Board's statement that its review had included "all other documents contained in the Cover Sheet." We conclude that Herold has not made a showing of prejudice from the inclusion of Waugh's letter in his file sufficient to warrant reversal, *cf.* 5 U. S. C. §1009(b) and (c). There was no such inconsistency between the statements of Herold's having attended Witness meetings in 1951 or 1952 and his later statements and actions as is claimed; if the Appeal Board considered Waugh's letter at all, its effect would have been helpful to Herold rather than the reverse. *United States ex rel.*

De Graw v. *Toon*, 151 F. 2d 778 (2d Cir. 1945), on which appellant relies, is worlds apart from this case.

Judgment affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of July one thousand nine hundred and sixty.

Present: HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Richard Secor Corliss,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

By: NIALL F. O'DOHERTY,
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of July one thousand nine hundred and sixty.

Present: HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Fred August Heise,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION, WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

By: NIALL F. O'DOHERTY,
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of July one thousand nine hundred and sixty.

Present: HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Walter Herold,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

By: NIALL F. O'DOHERTY,
Chief Deputy Clerk

APPENDIX E

STATUTES AND REGULATIONS INVOLVED

50 U. S. C. App. § 451(c)

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—62 Stat. 604 (1948), 65 Stat. 75 (1951), 50 U. S. C. App. § 451(c) (1952).

50 U. S. C. App. § 456(j)

"Nothing contained in this title [sections 451-470 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of

the national health, safety, or interest as the local board may deem appropriate and such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recom-

mend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objector."—62 Stat. 609 (1948), 65 Stat. 83 (1951), 50 U.S.C. App. § 456 (j) (1952.

50 U.S.C. App. § 462(a)

"Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *." 62 Stat. 622 (1948), 50 U.S.C. App. § 462(a) (1952).

32 C.F.R. § 1622.1(b), (d)

"(b) Classification is the key to selection and it must be accomplished in the spirit of the Universal Military Training and Service Act, as amended, in which the Congress has declared that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

* * * * *

"(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color,

or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice." —32 C. F. R. § 1622.1(b), (c); E. O. 10292, 16 F. R. 9862, Sept. 28, 1951.

32 C. F. R. § 1622.11

"Class I-A-O; Conscientious objector available for noncombatant military service only. (a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

"(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

"Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." —32 C. F. R. § 1622.11; E. O. 10292, 16 F. R. 9862, Sept. 28, 1951.

32 C. F. R. § 1622.14

"Class I-O; Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest. (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

"(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

"Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." 32 C.F.R. 1622.14; E.O. 10420, 17 F.R. 11485, 11503, Dec. 19, 1952 (Section 1622.14(b) contained in E.O. 10292, 16 F.R. 9862, Sept. 28, 1951).

32 C.F.R. § 1626.25

Special procedure when appeal involves claim that registrant is a conscientious objector. (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained it shall

recommend to the appeal board that such objections be not sustained.

"(c) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that, within 30 days after the date of such mailing, he may file with the appeal board a written reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be bound to follow the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant."—32 C. F. R. § 1626.25; E. O. 10363, 17 F. R. 5449, 5451, June 18, 1952; paragraphs (a) and (c) as amended by E. O. 10659, 21 F. R. 1103, Feb. 17, 1956.

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No. 345

In the Supreme Court of the United States

OCTOBER TERM, 1960

RICHARD SECOR CORLISS, FRED AUGUST HEISE, AND WALTER HEROLD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
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